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16 UNITED STATES DISTRICT COURT  
17 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION  
18

19 MICHAEL LAVIGNE, *et al.*,  
20 Plaintiffs,  
21 vs.  
22 HERBALIFE LTD., *et al.*,  
23 Defendants.  
24

CASE NO. 2:18-cv-07480-JAK (MRWx)

[Related Case 2:13-cv-02488-BRO-RZ]

**PLANTIFFS' MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF *EX PARTE*  
APPLICATION TO MODIFY  
SCHEDULING ORDER**

*[Filed concurrently with [Proposed]  
Order]*

Assigned to Hon. John A. Kronstadt,  
Courtroom 10B

1       **I.       INTRODUCTION**

2           The parties are in agreement that the current scheduling order needs to be  
3 modified but disagree about which deadlines should be extended. Defendant solely  
4 wishes to extend the summary judgment deadline, while Plaintiff requests that any  
5 modification should include the expert discovery deadlines.

6           Several factors necessitate this extension; most importantly is the pendency of  
7 Defendant's Motion to Dismiss (ECF No. 208) and Plaintiffs' Motion for Class  
8 Certification (ECF No. 207) (collectively the "Pending Motions"). Moreover, third-  
9 party witnesses, working closely with Herbalife, have refused to submit to online  
10 depositions until very recently, providing dates for their depositions for the first time  
11 on June 12, 2020 (after months of requests).

12           Accordingly, *ex parte* relief is necessary.

13           This case is about Defendant Herbalife International of America Inc. conspiring  
14 with over forty individuals who act together, using misrepresentation and deceit, to  
15 sell tickets to a series of live events. The events are pitched as the guaranteed pathway  
16 to life changing financial success with the multi-level marketing business opportunity  
17 sold by Defendant. During the relevant period, Defendant sold hundreds of thousands  
18 of tickets to the prospective class members at a cost ranging from \$40 to \$175.  
19 Declaration of Etan Mark ("Mark Decl."), ¶ 3-4. The highly detailed First Amended  
20 Complaint (ECF No. 202), accuses Herbalife of conducting the affairs of a  
21 racketeering enterprise, conspiring to conduct the affairs of a racketeering enterprise,  
22 violations of California's Unfair Competition Law, and negligent misrepresentation.  
23 Defendant's moved to dismiss the First Amended Complaint, ECF No. 208, and  
24 Plaintiffs have moved to certify a class based on the allegations in the First Amended  
25 Complaint, ECF No. 207. On February 24, 2020, the Court heard oral argument on  
26 the Pending Motions. Two days later, the Court entered the following Order:

27           The Motions are taken UNDER SUBMISSION. Counsel should meet  
28           and confer, and file a joint report on or before 3/5/2020, with their

1       respective and/or collective views as to what dates should be adopted  
2       for future pre-trial proceedings in this matter following the issuance of  
3       the orders on both the Defendant's Motion and Plaintiffs Motion.

4       On March 5, 2020, the Parties issued a joint report urging the Court to hold all  
5       outstanding deadlines in abeyance pending ruling on the two outstanding motions.  
6       ECF No. 262. On April 22, 2020, the Court entered an order extending all deadlines  
7       by approximately four months. ECF No. 266.

8       The parties agree that some extension of pretrial deadlines is necessary.  
9       Defendant's counsel recently reached out to Plaintiffs' counsel requesting a  
10      stipulation to extend the deadline to file dispositive motions. Mark Decl. at ¶ 6.  
11      Plaintiffs agreed, but sought confirmation that Defendant would agree to similarly  
12      extend the initial expert disclosure deadline. *Id.* Although Defendant previously  
13      recognized that expert disclosures should not occur until after the Court's ruling on  
14      class certification and motions to dismiss, *see* ECF No. 262, Defendant's counsel  
15      indicated that he would likely be unable to agree to that relief. Plaintiffs' counsel  
16      followed up with Defendant's counsel on Monday, June 15 and he confirmed that  
17      Herbalife would not agree to the requested extension. Mark Decl. at ¶ 7. This *ex parte*  
18      motion followed.

19      Plaintiffs have not been idle since oral argument on the Pending Motions. In  
20      addition to attempting to confer with Defendant on certain discovery issues, Plaintiffs  
21      have been diligently attempting to obtain discovery from six critical non-party  
22      witnesses: Leslie Stanford, Susan Peterson, Enrique Carillo, John Tartol, Garrain  
23      Jones, and Cody Morrow (the "Testifying Producers"). The Testifying Producers  
24      possess key information and documents directly relevant to Plaintiffs' allegations.  
25      Despite agreeing to produce documents and provide deposition dates in January, the  
26      Testifying Producers waited another three months to begin producing documents and  
27      failed to offer even a single deposition date until June 12, 2020. *Id.* at ¶¶ 8-13. Now,  
28      after belatedly producing over 300,000 pages, some (but not all) of the Testifying

1 Producers have agreed to sit for deposition on select dates through July 30, 2020, *id.*,  
2 fourteen days after the current expert disclosure deadline and three days after the  
3 current deadline to file motions.

4 Plaintiffs' request for a modified scheduling order should be granted for three  
5 reasons:

6 First, the pleadings are not yet closed. The Court has yet to rule on Defendant's  
7 Motion to Dismiss. Defendant has not pled its affirmative defenses in this matter and  
8 it would be unfair to compel Plaintiffs to disclose expert reports without the benefit  
9 of first considering those defenses.

10 Second, the size and scope of the class has yet to be defined by the Court. It is  
11 unreasonable to require Plaintiffs to advance expert testimony — including damages  
12 testimony completely contingent on class definition — before any class has been  
13 defined by the Court. Because a ruling on Plaintiffs' Motion for Class Certification  
14 is imminent, from a practical standpoint it makes sense to postpone the deadline to  
15 exchange expert reports and engage in expert discovery until after the parties have the  
16 benefit of a ruling on that motion.

17 Third, Plaintiffs have not been provided an opportunity to finalize the discovery  
18 they need to bring this case to a conclusion — either at trial or on summary judgment.  
19 Plaintiffs have diligently litigated this case from its inception. To date, the parties  
20 have exchanged hundreds of thousands of pages of documents, served written  
21 discovery and have participated in eleven depositions, with at least six more to be  
22 scheduled in the coming months. Plaintiffs have been requesting documents and  
23 deposition dates from the Testifying Producers for the last six months, only recently  
24 securing documents and proposed dates. At this rate, its fact investigation stage will  
25 be complete after the expert disclosure deadline and after the dispositive motion  
26 deadline, but before any affirmative defenses are lodged.<sup>1</sup> This sequencing is

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27  
28 <sup>1</sup> Plaintiffs have reserved the right to seek the completion of Herbalife's corporate

1 prejudicial to the Plaintiffs who will not be able to test the sufficiency of Herbalife's  
2 defenses in fact discovery and will not have the benefit of critical witness testimony  
3 in support of its expert opinions.

4 By this motion, Plaintiffs respectfully submit that the deadlines be reset so as  
5 to mitigate this prejudice.

## 6 II. LEGAL ANALYSIS

7 *Ex parte* relief is appropriate where the moving party seeks relief that cannot  
8 be addressed by a regularly-noticed motion, and will face prejudice if its application  
9 is denied, provided that the party is without fault in creating the need for *ex parte*  
10 relief. *See Mission Power Engineering Co. v. Continental Cas. Co.*, 883 F. Supp. 488,  
11 492 (C.D. Cal. 1995). As explained below, *ex parte* relief is appropriate because  
12 Plaintiffs have diligently litigated the case from its inception, because denial of *ex*  
13 *parte* relief would prevent Plaintiffs from obtaining critical discovery necessary to its  
14 efforts to prepare its initial expert disclosures and motions for summary judgment  
15 through no fault of their own, and because Defendant will not be prejudiced by the  
16 relief sought herein. In fact, the parties all agree that the deadlines should be extended,  
17 but the Defendant wishes the deadlines to be extended in a manner that maximizes  
18 the prejudice to the Plaintiffs rather than allowing the orderly administration of this  
19 matter.

20 In determining whether to modify the current scheduling order, the Court  
21 should consider (i) the degree of prejudice to any party; (ii) the ability of that party to  
22 cure the prejudice; (iii) any impact which the amendment would have on the orderly  
23 and efficient conduct of the trial; and (iv) any willfulness or bad faith by the party  
24 seeking the amendment. *Newegg Inc. v. Ezra Sutton, P.A.*, CV1501395TJHJCX, 2016  
25 WL 9108891, at \*1 (C.D. Cal. Aug. 19, 2016) (citing *Galdamez v. Potter*, 415 F.3d  
26 1015, 1020 (9<sup>th</sup> Cir. 2005). *Unihan Corp. v. Max Group Corp.*, CV 09-07921 MMM

27 \_\_\_\_\_  
28 representative deposition and seek additional discovery pending receipt of the answer  
and affirmative defenses.

1 PLAX, 2011 WL 6814044, at \*1 (C.D. Cal. Dec. 28, 2011) (same). Each of these  
2 factors weigh in favor of a modification here.

3 **a. Plaintiffs will be prejudiced if *ex parte* relief is not granted.**

4 Due to the unique procedural posture here and the scope of the allegations  
5 made, Plaintiffs would be prejudiced absent a continuance of pending deadlines  
6 including the deadline to serve initial expert disclosures (July 16, 2020) and the last  
7 day to file motions (including dispositive and discovery motions, July 27, 2020).  
8 There are three reasons why Plaintiffs will be prejudiced if the scheduling order is not  
9 modified: (1) the pleadings are not yet closed in this matter; (2) the size and scope of  
10 the class has yet to be defined by the Court; and (3) Plaintiffs have been denied access  
11 to critical discovery through no fault of their own. For each of these reasons the  
12 scheduling order should be modified.

13 **1. The pleadings are not yet closed in this matter.**

14 If the Court completely denies Defendant's Motion to Dismiss and grants  
15 Plaintiffs' Motion for Class Certification in its entirety, Defendant would still need to  
16 plead their affirmative defenses. It is unfair and impractical to expect Plaintiffs to  
17 proceed with expert disclosures before having the benefit of complete pleadings.  
18 Similarly, it is untenable that Plaintiffs will not have the ability to move for summary  
19 judgment on any of Herbalife's defenses under the current schedule.

20 The case of *Dinwiddie v. United States*, 1:18-CV-00197-DCN, 2020 WL  
21 86193, at \*2 (D. Idaho Jan. 7, 2020), is instructive. In that case, the United States (a  
22 defendant in a civil matter) sought leave to add additional, previously unpled  
23 affirmative defenses. *Id.* at \*1. The Plaintiff then sought an extension of the expert  
24 disclosure deadline, but the United States refused contending Plaintiff "was aware of  
25 its intent to provide evidence of [the unpled affirmative defenses] because it stated as  
26 such in a response to interrogatories." *Id.* In rejecting the United States' argument  
27 and granting Diwiddie's request to extend the expert disclosure deadline, the  
28

1 *Dinwiddie* court held:

2 The Court rejects the United States' argument that Julie failed to  
3 diligently pursue this discovery because she had adequate notice of this  
4 defense via the February 5, 2019, response to interrogatories. The  
5 language in the response that purportedly puts Julie on notice simply  
6 states, "the transfer was fraudulent under the laws of the State of  
7 Alaska." Dkt. 31-1, at 8. Even if it can be said that this language is  
8 legally sufficient to alert Julia of the United States' intent to utilize the  
9 fraudulent transfer affirmative defense, that language was contained in  
10 a response to an interrogatory, not in an answer to a complaint. As such,  
11 it cannot qualify as an affirmative defense. *See* Fed. R. Civ. Pro. 8(c)  
12 ("In responding to a pleading, a party must affirmatively state any  
13 avoidance or affirmative defense."). A response to an interrogatory  
14 does not carry the same significance that an affirmative defense does.  
15 The United States must have known this, which is why on August 1,  
16 2019, it filed an Amended Answer and included the new affirmative  
17 defense.

18 *Id.* at \*2.

19 Plaintiffs are not seeking a significant extension of pretrial deadlines. Rather,  
20 Plaintiffs are requesting what they anticipate will be the minimum extension  
21 necessary to properly prepare experts for this complex case after having the benefit  
22 of seeing Defendant's answer and affirmative defenses.<sup>2</sup> It is all but definitionally  
23 prejudicial to deny Plaintiffs the ability to engage in discovery in response to  
24 affirmative defenses. *See, e.g., Gold v. Midland Credit Mgt., Inc.,*  
25

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26 <sup>2</sup> Defendant previously claimed that Plaintiffs are "familiar" with their affirmative  
27 defenses. To the extent Defendants' wish to provide the Plaintiffs' with their  
28 affirmative defenses now, Plaintiffs envision only needing an additional 45 days to  
complete fact discovery, rather than the 60 days requested.



1 13CV02019BLFMEJ, 2014 WL 3371429, at \*3 (N.D. Cal. July 9, 2014) (discussing  
2 Plaintiffs right to seek discovery on affirmative defenses); *New York v. Micron Tech.,*  
3 *Inc.*, C 06-6436 PJH, 2009 WL 29883, at \*6 (N.D. Cal. Jan. 5, 2009) (same).

4 For this reason alone, Plaintiffs would be unfairly prejudiced without an  
5 extension of the expert disclosure deadline.

6 2. The size and scope of the putative class has not been defined by the  
7 Court.

8 Additionally, it does not make sense for the parties to rush to proceed with their  
9 expert disclosures when the size and scope of the class is going to be defined by the  
10 Court imminently. The Court's ruling on the Pending Motions will undoubtedly have  
11 an effect on Plaintiffs' expert disclosures. While Plaintiffs can submit expert  
12 disclosures based on the current allegations of the Amended Complaint and can  
13 attempt to guess the most likely ruling on class certification, it would be highly  
14 inefficient – and prejudicial – for Plaintiffs to do so. It is difficult to imagine a scenario  
15 where the Plaintiffs submit their expert disclosures in four weeks from now, and then  
16 are not compelled to renew those disclosures in light of the Court's rulings and  
17 Defendant's affirmative defenses. This is not only a waste of party resources, it also  
18 unduly prejudices Plaintiffs to be forced to submit at least two sets of expert reports.  
19 Herbalife itself implicitly recognized this prejudice, and initially agreed that expert  
20 disclosures should not occur until after the Court's rulings. ECF No. 262. For these  
21 reasons, the Court should extend the deadline to exchange expert reports and engage  
22 in expert discovery until after the parties have the benefit of a ruling on that motion.

23 3. Plaintiffs have been denied access to critical discovery through no  
24 fault of their own.

25 Plaintiffs have not been sitting in idle for the last year and a half. The parties  
26 have exchanged hundreds of thousands of pages of documents, served written  
27 discovery, spent dozens of hours conferring on the proper scope of discovery,  
28



1 participated in eleven depositions, and served dozens of subpoenas on critical third-  
2 party witnesses. As evidenced by their October 31, 2019, *ex parte* application to  
3 extend pretrial discovery deadlines (ECF No. 199), Defendant and Testifying  
4 Producers spent the bulk of last year refusing to produce any documents and have  
5 unfairly and improperly delayed Plaintiffs access to discovery in this matter. Since  
6 then, Plaintiffs have held several discovery conferences with Magistrate Judge  
7 Wilner, culminating with a hearing on January 29, 2020. As a result of that hearing,  
8 Defendant agreed to produce critical information and did so six weeks later.

9 At the same hearing the Testifying Producers (who are operating under a joint  
10 defense agreement with Herbalife) agreed to produce documents and sit for  
11 deposition. However, Herbalife and counsel for the Testifying Producers refused to  
12 offer any deposition dates until June 12, 2020 (initially claiming no dates of  
13 availability and then refusing to participate in Zoom proceedings). *Id.* at ¶¶ 8-13. The  
14 Testifying Producers did not begin document production until April 2020 (producing  
15 over 300,000 pages thus far) with production still ongoing. *Id.* Counsel for the  
16 Testifying Producers have offered deposition dates for only five of the six witnesses,  
17 and those dates extend beyond the current July 27, 2020, deadline to file all motions  
18 (including discovery motions). *Id.*

19 These documents and depositions are critical for both Plaintiffs' anticipated  
20 expert testimony and anticipated motions for summary judgment. Even if it were  
21 somehow practical for Plaintiffs to review 300,000 pages and work with an expert to  
22 comply with the July 16, 2020 expert disclosure deadline, the Testifying Producers  
23 have only offered deposition dates after that deadline. Plaintiffs have been asking for  
24 documents and deposition dates for months, but the Testifying Producers have failed  
25 to comply. *Id.*

26 These documents and testimony are highly relevant to Plaintiffs' case. The  
27 Amended Complaint alleges a significant conspiracy between Herbalife and its top  
28

1 distributors, six of which are the Testifying Producers. As the Court recognized in its  
2 order on the motion to dismiss, the Plaintiffs’ allegations of the Defendants’ enterprise  
3 “satisfy the three elements of the distinct enterprise test.” ECF No. 196 at 7. This  
4 enterprise consists of a Herbalife corporate entity along with individual Herbalife  
5 distributors and the entities that they control. *Id.* Although the claims against the top  
6 distributors have been severed — as a result of *Herbalife*’s insistence that this case be  
7 transferred to California — they remain important witnesses in this case. Top  
8 distributors make up the operative units of the alleged RICO enterprise. Through their  
9 participation in national strategy and planning committees, and through their  
10 operation of local and regional planning and leadership groups, the top distributors  
11 control many of the most fundamental aspects of the scheme. A large subset of Circle  
12 of Success events — eight of twelve months per year — are directly sold and  
13 controlled by top distributors. Only (apparently) these top distributors have access to  
14 the financial information relating to this large subset of events, a fact that was  
15 confirmed by Herbalife’s corporate representative at his September 25, 2019,  
16 deposition.

17  
18 **b. The orderly administration of this case and trial**

19 As the schedule currently stands, expert disclosures are due prior to the filing  
20 of affirmative defenses. The schedule also requires the parties to prepare expert  
21 reports before the Court rules on Defendant’s Motion to Dismiss or Plaintiffs’ Motion  
22 for Class Certification. The effect of the current scheduling order will likely require  
23 expert reports to be amended in order to conform with the Court’s rulings on the  
24 Pending Motions and Defendant’s to-be-pled affirmative defenses. Granting this *ex*  
25 *parte* motion, however, will result in the orderly and efficient administration of this  
26 case without effecting the trial date in this matter (as this matter is not yet on the  
27 Court’s trial docket).

1                   **c. Plaintiffs’ good-faith pursuit of discovery**

2           Upon transfer of this case to this district, Plaintiffs promptly propounded  
3 discovery. *See* Mark Decl., ¶ 14. To date, the Plaintiffs have propounded requests  
4 for production on November 14, 2018, August 23, 2019 and November 22, 2019 a  
5 request for inspection on October 17, 2019, and interrogatories on June 12, 2019,  
6 August 9, 2019 and November 22, 2019. *Id.* at ¶ 15. Moreover, Plaintiffs have  
7 participated in eleven depositions, have propounded dozens of third-party subpoenas  
8 *duces tecum* and plan to depose each of the Testifying Producers in the coming weeks,  
9 subject to coordination with opposing counsel. *Id.* at ¶ 16.

10           Since the parties last submitted their joint scheduling report, the country has  
11 been faced with a pandemic, the Court has not yet ruled on the Pending Motions, and  
12 Plaintiffs have failed to receive critical discovery from third-party witnesses through  
13 no fault of Plaintiffs. Simply, the requested relief is due entirely to factors outside of  
14 Plaintiffs’ control. Plaintiffs efforts have been diligent, consistent, and have clearly  
15 established good cause for the relief sought herein. *John v. Mammoth Recreations,*  
16 *Inc.*, 975 F.2d 604, 609 (9th Cir. 1992) (“[G]ood cause means scheduling deadlines  
17 cannot be met despite [a] party’s diligence”).

18                   **III. PLAINTIFFS’ NOTIFIED DEFENDANTS OF THIS APPLICATION**

19           Plaintiffs gave notice to Defendants of this application, as required by Local  
20 Rule 7-19. Defendants’ counsel’s, name, address, telephone number, and e-mails re  
21 as follows:

22           Paul Chan, Mark T. Drooks, and Gopi K. Panchapakesan

23           Bird, Marella, Boxer, Wolpert, Nessim, Drooks, Lincenberg & Rhow, P.C.

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Plaintiffs' counsel conferred numerous times with Defendants' counsel Paul Chan regarding the relief sought herein. The parties were ultimately unable to agree on the relief sought. Thus, this application became necessary.

#### IV. PROPOSED MODIFIED SCHEDULING ORDER

As required by the Court's Standing Order (ECF No. 266), Plaintiffs submit the following amended proposed scheduling order consistent with the Court's requirements:

[July 16, 2020] September 16, 2020	Initial Expert Disclosures
[July 30, 2020] September 30, 2020	Rebuttal Expert Disclosures
[August 13, 2020] October 14, 2020	Expert Discovery Cut-Off
[July 27, 2020] October 21, 2020	Last day to file All Motions (including discovery motions)
[August 15, 2020] <b>NO CHANGE</b> August 15, 2020	Last day to participate in a settlement conference/mediation
[August 20, 2020] <b>NO CHANGE</b> August 20, 2020	Last day to file notice of settlement / joint report re settlement
[August 31, 2020] at 1:30p.m. <b>NO CHANGE</b> August 31, 2020 at 11:30a.m.	Post Mediation Status Conference

## V. CONCLUSION

DATED: June 16, 2020

Mark Migdal &amp; Hayden

Etan Mark